

Publisher's Note

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Brown Civil Appeals

There have been several significant appellate court judgments in the past 6 months in relation to civil appeals. Other intermediate appellate courts elaborated upon the dismissal of an appeal for lack of merit, and the standard of appellate review of the decisions of a Monitor appointed under the *Companies' Creditors Arrangement Act* ("CCAA").

What's New in this Update

Dismissal Without Hearing for Lack of Merit

1. In *Jardine v. Hyggen*, 2018 SKCA 38, the Saskatchewan Court of Appeal was presented with an application under Rule 46.1(1)(c) of the Court of Appeal Rules seeking to have an appeal dismissed before it was perfected on the basis that it was manifestly without merit. The Court began by noting that the Rule reflected the idea that a respondent should not have to endure the expense and delay involved in playing out an appeal in the usual way if the appeal was destined to fail. However, the Court pointed out two countervailing considerations: one, that such a dismissal deprived

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a litigant of its opportunity to put its position fully to the Court, and two, where the application failed there would be duplication of effort and resulting costs. In the course of his reasons, Richards, C.J.S., reviewed the past decisions of the other intermediate appellate courts in Canada and then addressed the standard to be applied, noting that it was “high” and that it would be met only exceptionally. He stated:

. . . the threshold for quashing an appeal as being manifestly without merit is high. The Shorter Oxford English Dictionary, 6th ed, defines “manifestly” as meaning “evident to the eye or to the understanding” or “plainly revealed”. . . an appeal that is manifestly without merit is one where it is entirely clear the appeal is destined to fail and where, conversely, there is no possibility that any ground of appeal might succeed.

Standard of Review of a CCAA Monitor

2. In *8640025 Canada Inc. (Re)*, 2018 BCCA 93, the British Columbia Court of Appeal was faced with determining the standard of appellate review of a Monitor appointed pursuant to the CCAA. What is interesting about the case is that the proceedings to determine ownership of assets by assessing the appellants’ proofs of their claims were not adversarial in nature. The procedure followed by the Monitor did not entail a formal hearing of witnesses’ testimony, although it did involve the examination of documents and affidavits of representatives of interested persons. Nevertheless, since the Monitor was an officer of the Court and thus above the fray, the Court held that the appeal from the Monitor’s decision was a “true appeal” and subject to the usual *Housen* standard of correctness for extricable questions of law and the standard of palpable and overriding error for questions of fact or mixed fact and law.